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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 78

SAMUEL SILBIGER,

Petitioner,

against

PRUDENCE BONDS CORPORATION (NEW CORPORATION) AND RECONSTRUCTION FINANCE CORPORATION.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL SILBIGER,
Counsel for Petitioner, pro se.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petitioner, Samuel Silbiger, respectfully prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit entered in the above cause on March 7, 1950, whereby it was adjudged that petitioner in advocating the rights of his client, George E. Eddy as a holder of bonds in what is termed "Surplus Series", was disloyal to his clients, Mrs. Born and Mrs. Reilly, who held bonds only in "Deficit Series" (R. 757) as well as to all bondholders of those "Deficit Series" in whose accountings he had appeared for any of his three clients; (R. 759) and that in consequence thereof, petitioner should be penalized by the reduction of the award of $75,000.00 to him as counsel fees by at least one-third (R. 761).

The decision was rendered on the appeal of Prudence Bonds Corporation and Reconstruction Finance Corporation allowed by the Court of Appeals "limited to the ques-

tion of conflict of interest represented" (R. 7). The application of petitioner to the Court of Appeals for the Second Circuit for leave to appeal from the District Court's order awarding allowances to counsel was denied (R. 13). Petitioner's appeal from said order, taken as of right, was on motion of respondent, Prudence Bonds Corporation, dismissed. Petitioner filed herein on January 18, 1950, a petition for writs of certiorari to review the Orders of the Circuit Court of Appeals, docketed as No. 546 of the October Term 1949, and same was denied on April 24, 1950. The petition of respondent, Prudence Bonds Corporation, filed on April 28, 1950, for a writ of certiorari to review the said decree dated March 7th, 1950, docketed as No. 785 October Term, 1949, is now pending before this Court.

Opinion Below

The opinion of the Court of Appeals for the Second Circuit, dated March 7, 1950 (R. 755) is not yet reported; the opinion dated April 5, 1950, on the motions for rehearing (R. 785), is not yet reported.

Jurisdiction

The decree of the Court of Appeals for the Second Circuit was entered on March 7, 1950 (R. 765). The decree denying rehearing was entered April 5, 1950 (R. 786).

The jurisdiction of this Court is invoked under Title 28, Section 1254(1) of the United States Judicial Code, and Section 24(c) of the Bankruptcy Act, as amended, 11 U. S. C. Sec. 47(c).

Questions Presented

1. Did the Court below err in deciding that petitioner violated the rule of undivided loyalty due from an attorney to his client?

2. Is the conclusion of the Special Master and the District Court that petitioner did not violate the Canons of Professional Ethics (R. 273), sustained by the evidence?

3. Is the conclusion of the Special Master and the District Court that "at the time Mr. Silbiger rendered the services herein, his relations with clients, who held bonds in series in which there was a deficiency of collateral, was not such as to create a conflict of interests so as to deprive him of compensation for the services rendered in Series having a surplus" (R. 273), sustained by the evidence?

4. Did the Court below err in refusing to hear petitioner's appeal and in failing to decide the controversy herein on the merits?

5. Did the Court below err in denying to petitioner the substantive right of appeal as in any ordinary equity proceeding and in subjecting the instant proceeding to the provisions of Sec. 250 of the Bankruptcy Act?

6. Did the Court below err in applying the proper theory of law for the evaluation of petitioner's services rendered on a contingent basis and determining the reasonable value of such services in accordance with the rule in New York State?

Statement

Prudence Bonds Corporation filed its petition for reorganization under Section 77B of the Bankruptcy Act in the United States District Court for the Eastern District of New York on June 29, 1934 (R. 212). At that time it had outstanding eighteen series of First Mortgage-Collateral Bonds in the aggregate amount of approximately $56,000,000 (R. 212) and each bond was guaranteed as to principal and interest by The Prudence Company, Inc. (R. 212). The Prudence Company, Inc., the guarantor, was the holder of $1,910,300.00 of such bonds (R. 213) and by an order entered July 21, 1937, it was decreed that such bonds held by the

guarantor were subordinate and not entitled to share in the collateral underlying the respective series until all the bonds of the Series in the hands of the public were paid or provided for in full, both as to principal and interest theretofore accrued or thereafter accruing (R. 214). The guarantor, on or about February 1st, 1935, filed its petition for reorganization under said Sec. 77B and its plan of reorganization was confirmed by order dated May 26, 1939, and its assets were vested in a new company under the name of Prudence Realization Corporation (R. 212).

The order of subordination dated July 21, 1937, was appealed by the Reorganization Trustees of the guarantor corporation, and upon a compromise and settlement of such controversy, the appeal was withdrawn and said Trustees accepted subordination of the $1,910,300.00 of bonds held by the guarantor as such subordination was defined in paragraph 11 of the several Plans of Reorganization of the Eighteen Series of Prudence Bonds, and as provided and defined in said order of July 21, 1937 (R. 214).

Paragraph 11 of the plans provided that the Plan "shall, so far as legally possible, be without prejudice to the rights of the holders of the Bonds" against the guarantor, "arising out of, under or in connection with the present guaranty of the bonds by said The Prudence Company, Inc., and all causes of action accruing to said bondholders by reason of such guaranty are reserved to them, to the extent permitted by law." It further provided that "If, as a matter of law, said bonds owned by The Prudence Company, Inc., are, in respect of the right to participate in the proceeds of the collateral, subordinate to the Publicly Held Bonds, such Bonds so owned by The Prudence Company, Inc., shall not * * * be entitled to receive any distributions on account of principal until all of the Publicly Held Bonds shall have been fully paid, redeemed, purchased or retired, and said Bonds so owned by The Prudence Company, Inc., shall be entitled to receive such subordinate

interest to which they may be legally entitled" (Prior Record, pp. 178-179 *).

The separate Plans of Reorganization for each of the Eighteen Series of Prudence Bonds, except the 15th Series, were substantially alike and together with a General Plan were confirmed on January 18, 1938 (R. 215), and the respective Indenture Trustees were by orders dated April 27, 1938, directed to assign the respective collateral deposited to secure the bonds to City Bank Farmers Trust Company, as Successor Trustees of all the Eighteen bond issues, and to file their respective accounts of their proceedings and acts as trustees and to apply for a judicial settlement thereof herein (R. 217). Pursuant to such orders the trustees transferred the collateral underlying each Series of Bonds to the Successor Trustee, as of March 1st, 1938 (Prior Record 117), and filed their accounts during July and August, 1938 (R. 225).

On October 2nd, 1939, petitioner filed objections to the accounts of the several trustees of Prudence Bonds Series AA, Third, Fifth, Eighth, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth and Eighteenth on behalf of his client, George E. Eddy, a holder of bonds in such series (R. 22, 31, 45), and appeared on his behalf in the Ninth Series as a holder of bonds in Series in which Ninth Series Bonds formed part of the Trust Fund (R. 38). He also filed objections to the accounts of the Trustees in the Fourth and Sixteenth Series on behalf of Katherine Born, a holder of such bonds, and in the Eleventh Series on behalf of Bessie B. Reilly, a holder of such bonds (R. 226). Objections to such accounts were also filed by the new Prudence Bonds Corporation and the Trustees of the Debtor, as also by bondholders represented by Joseph Nemerov, Esq. (now deceased).

Important and very difficult litigation resulted as to these accounting proceedings and found their way to the

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*"Prior record" refers to *Eddy* v. *Prudence Bonds Corporation*, 165 F. 2d 157, cert. denied, 333 U. S. 845, already on file in this Court.

Court of Appeals and this Court in *Central Hanover Bank & Trust Co.* v. *President, etc. of the Manhattan Co.*, 105 F. 2d 130; *Manufacturers Trust Co.* v. *Kelby*, 125 F. 2d 650, cert. denied 316 U. S. 697; *Brooklyn Trust Co.* v. *Kelby*, 134 F. 2d 105, cert. denied 319 U. S. 767; *President & Directors of the Manhattan Co.* v. *Kelby*, 147 F. 2d 465, cert. denied 324 U. S. 866.

While such litigation was progressing, settlements and compromises were effected and were approved by the District Court in Thirteen of the accounting proceedings and the various accounting Trustees paid into the respective trust funds the following amounts (R. 45):

Series A.A.	$ 70,000.00
Series Third	182,500.00
Series Fourth	74,000.00
Series Sixth	40,000.00
Series Seventh	307,000.00
Series Eighth	250,000.00
Series Eleventh	50,000.00
Series Twelfth	175,000.00
Series Thirteenth	22,500.00
Series Fourteenth	2,000,000.00*
Series Sixteenth	90,000.00
Series Seventeenth	150,000.00
Series Eighteenth	85,000.00

For his services in connection with such accounting proceedings petitioner was awarded allowances as follows (R. 46):

In Series A.A.	$ 535.00
In Series 3rd	1,398.00
In Series 4th	566.40
In Series 6th	576.00
In Series 7th	2,351.40

*As part of the settlement in the Fourteenth Series, the trustee received collateral in the Trust Fund of the approximate value of $1,000,000.

In Series 8th	4,000.00
In Series 11th	750.00
In Series 12th	886.08
In Series 13th	113.92
In Series 14th	15,000.00
In Series 16th	1,200.00
In Series 17th	1,148.40
In Series 18th	1,234.00
Total	$29,759.20

For their services in the thirteen accounting proceedings so settled there was awarded to Hon. Charles H. Kelby, Trustee of the Debtor, $84,360, George C. Wildermuth, Esq., attorney for the Trustee of the Debtor, $65,750, Joseph Nemerov, Esq., $33,500 (R. *Eddy* v. *Kelby*, 163 F. 2d, 56, pp. 21-23; cert. denied 332 U. S. 836). Charles M. McCarty, Esq., who was the attorney for respondent Prudence Bonds Corporation under an annual retainer, made no application for allowances for his services in said thirteen accounting proceedings except in the Fourteenth Series, and he was awarded therefor the sum of $15,000 (Id., p. 23).

In the accounting proceeding relating to the Sixteenth Series, Marine Midland Trust Company of New York was the accounting trustee. In said proceeding, petitioner, on October 2nd, 1939, filed objections to the account on behalf of George E. Eddy, Katherine Born and Nellie D. Stone, each of whom held bonds in the Sixteenth Series. That proceeding was settled and the order approving the settlement was made on *February 21, 1941.* Consents to such settlement were executed by George E. Eddy on November 14th, 1940; by Katherine Born on November 15th, 1940 and by Nellie D. Stone on November 28th, 1940 (R. 576).

In the accounting proceeding brought by Central Hanover Bank & Trust Company as Trustee of Prudence Bonds Sixth Series, petitioner appeared and filed objections on behalf of George E. Eddy, a holder of a bond in said series. The litigation was settled and compromised with the approval of the District Court on February 21st, 1941 (R. 577).

In the Fourth Series, the accounting trustee was City Bank Farmers Trust Company and petitioner filed objections to the account on behalf of Katherine Born who was the holder of Fourth Series Bonds. This litigation terminated in a settlement which was approved on *August 27th, 1942* (R. 577).

In the accounting by Chicago Title and Trust Company, as Trustee of the Eleventh Series, petitioner appeared for and filed objections to the account on behalf of Bessie B. Reilly, a holder of bonds in said series. Bessie B. Reilly on March 30, 1944 consented to a settlement and compromise and the settlement was approved by order *April 7th, 1944* and such proceeding terminated (R. 577).

President and Directors of the Manhattan Co. was the trustee of Series Fifth and Ninth. Petitioner appeared and filed objections to its account in the Fifth Series, on behalf of George E. Eddy, who was a holder of a Fifth Series bonds; he also appeared for Mr. Eddy in the Ninth Series accounting, although Mr. Eddy did not hold any Ninth Series Bonds, but he did hold bonds in the Thirteenth and Eighteenth Series, in each of which series bonds of the Ninth Series were deposited as part of the collateral trust funds (R. 577).

The Fifth and Ninth Series accountings went to trial and decrees under which the accounting trustee was surcharged with $1,065,565 in the Fifth Series (R. *Bank of Manhattan Co.* v. *Kelby*, 147 F. 2, 465, Fifth Series, p. 15; Cert. denied 324 U. S. 866); and in the Ninth Series with $148,560.86 (Id. Ninth Series Record, p. 15).

In said Ninth Series decree, the objections of Eddy to the accounts of the Trustee were dismissed on the ground that he was not the holder of a Ninth Series Bond (Id Ninth Series, 507, 14) as also his objections to the report of the Special Master (Id. 15).

The decrees of the District Court made no provision for interest on the sums with which the trustee was to be surcharged, and petitioner, on behalf of Eddy, appealed to the Court of Appeals therefrom. On the appeal of Eddy,

the dismissal of his objections in the Ninth Series was reversed, and the lower Court was directed to surcharge the trustee with interest (*President & Directors of the Manhattan Company* v. *Kelby,* 147 F. 2d, 465, cert. denied 324 U. S. 866). On the mandate of the Court of Appeals the trustee was surcharged with the further sum of $425,617.72 as interest in the Fifth Series and $57,985.80 in the Ninth Series (R. *Eddy* v. *Kelby,* 163 F. 2d 56, cert. denied 332 U. S. 836, p. 84). For the services of counsel in the Fifth and Ninth Series accounting proceedings the District Court awarded fees aggregating $155,000, to

> Estate of Charles H. Kelby, $60,000; Charles M. McCarty, $35,000; George C. Wildermuth, $20,000; Petitioner, $40,000 (Id. 31).

About May 16th, 1945, President and Directors of the Manhattan Company paid into the respective Fifth and Ninth Series Trust Funds the sums with which it was surcharged, with interest to date of such payments (R. 228).

On petition of Prudence Bonds Corporation, dated August 2nd, 1945 the Court below issued two orders relating to the Fifth and Ninth Series respectively, returnable on September 4th, 1945, to show cause why order should not be made providing for the time and manner of filing applications for allowances for services and expenses in connection with said accounting proceedings, and authorizing, directing and determining and providing for the allocation, payment and distribution of the Trust Funds in said series of Prudence Bonds (R. 229).

Among those upon whom, by the Court's direction, the said orders to show cause were served, were the Bondholders' Reorganization Committee for the Sixth Series, *D. J. Pastorelle, et al., as a Committee for Bondholders of the Sixteenth Series,* General Committee or Prudence Securities, Tenth Series Committee and *petitioner as attorney for George E. Eddy* and Joseph Nemerov, Esq. as attorney for Hilda S. Reese *et al.* bondholders, besides all eleven former corporate Trustees of the Eighteen Series

Trust Funds, *Reconstruction Finance Corporation, Prudence Realization Corporation,* the Debtor, Trustees for the Debtor and all intervenors in the proceedings for the reorganization of the old Prudence Bonds Corporation, Debtor (R. 229, 230).

By two orders dated October 11th, 1945, the questions of allowances in connection with the Fifth and Ninth Series accountings were referred to Thomas M. Healy, Esq. and the questions of the allocation and distribution of the Trust Funds to James G. Moore, Esq. (R. 231).

The report and recommendations of Special Master Thomas M. Healy, Esq. relating to allowances was filed July 11th, 1946 (R. 232) and confirmed August 12th, 1946. After appeal to the Court of Appeals and denial of certiorari by this Court (*Eddy* v. *Kelby,* 163 F. 2d, 56, cert. denied 332 U. S. 836) the order of affirmance was entered on August 12th, 1947 (R. 234).

Pending the allocation and construction proceedings relating to the Fifth and Ninth Series, Prudence Bonds Corporation on a petition verified October 30th, 1946, applied for instructions with respect to the payment and distribution of certain income received in the Sixth Series (R. 234-5) and by a petition of City Bank Farmers Trust Company, Trustee of the Eighteenth Series of Prudence Bonds, verified December 19th, 1946, application was made with respect to the allocation and distribution of all of the Trust Funds except Series Fifteenth (R. 236-7).

The petitions and orders to show cause relating to the Sixth Series and to All series except the Fifteenth were directed to be and were served upon all the parties and their attorneys who were served with the Fifth and Ninth Series proceedings and in addition to such parties upon Herman Gottlieb, Esq., Arthur Miller, Esq., and Weil, Gotshal & Manges, Esqs., attorneys for bondholders (R. 235, 237), who first appeared in these proceedings after August 3rd, 1945 (R. 263, 267, 609-12).

Prudence Realization Corporation, successor to the reorganized The Prudence Company, Inc. appeared in the

Fifth and Ninth Series allocation proceedings and asserted a claim to payment of the principal of its subordinate bonds in the sum of $67,200 in the Fifth Series, and $105,700 in the Ninth Series.

Predicated on the opinion of the Court of Appeals in President and Directors of the *Manhattan Co.* v. *Kelby, et al.*, 147 F. 2d 465, cert. denied 324 U. S. 866 and the final decree entered thereon on May 16th, 1945, President and Directors of the Manhattan Company appeared in the said allocation proceedings and asserted a claim to payment of its subordinate liens of $85,825 in the Fifth Series (R. 165 F. 2d, 157, 140-1 Cert. denied 333 U. S. 845) and $88,124.98 in the Ninth Series (Id. 524). It also claimed the surplus funds in the Fifth Series (Id. 96) and in the Ninth Series the surplus to the extent of $120,007.08 (Id. 555).

Petitioner asserted the right of the Public Bondholders to the payment of the principal of their bonds, with full interest at the rate of 5½%, which claim would exclude Prudence Realization Corporation and President and Directors of the Manhattan Company from any distributive share in said Trust Funds (R. 519-520).

Special Master Moore's report in the Fifth Series, dated November 29th, 1946, recommended that the Trust Fund aggregating $1,529,492.76 should be allocated and distributed as follows:

(a) To reimbursement of income account	$ 81,565.14
(b) To payment of Publicly held bonds	1,077,450.00
(c) To Prudence-Realization Corporation in payment of its subordinate bonds	67,200.00
(d) To Bank of Manhattan—for its lien	85,825.00

(e) The excess to City Bank Farmers Trust Co. Trustee of other series	217,452.62
Total	$1,529,492.76

(R. 165 F. 2d, 157 Cert. denied 333 U. S. 845, 55-58).

Objections to said report were filed on behalf of the public bondholders as to items (c), (d) and (e) by petitioner (Prior record 82), Mr. Miller, and Weil, Gotshal & Manges, Esqs. (Prior record 90). Objections were filed by Prudence Realization Corporation as to item (a) (Prior record 88) and by Bank of Manhattan Co. as to item (e) (Prior record 94-6).

All these objections were overruled and the report was confirmed by order dated February 11, 1947 (Prior record 11).

Mr. Miller did not appeal. Petitioner and Weil, Gotshal & Manges, Esqs. appealed on behalf of their respective clients as to the items (c), (d) and (e) claiming all of said items belonged to the public bondholders (Prior record 73, 80). Prudence Realization Corporation appealed from said order as to item (a), claiming same should be added to the excess item (e) and paid to City Bank Farmers Trust Company as Trustee of the remaining series of Prudence Bonds in which the Trust Funds did not exceed the amount of principal owing on the publicly held bonds (Prior record, 78). Bank of Manhattan Co. appealed from said order in so far as it related to item (e) and claimed it was entitled to said item as recoupment or by way of subrogation (Prior record 76).

In the Ninth Series, the report of Special Master Moore was filed December 26, 1946. By this report he recommended payments or distribution of the Ninth Series Trust Fund:

(a) To reimbursement of income account	$ 46,631.51

(b) To payment of Publicly held bonds	1,452,850.00
(c) To Prudence-Realization Corporation in payment of subordinate bonds	105,700.00
(d) To Bank of Manhattan for its lien	88,124.98
(e) The excess to City Bank Farmers Trust Co. as Trustee of other Series	267,772.94

(R. 165 F. 2d 157, Appendix to Bank's Brief, pp. 13-16).

Objections to said report were filed by petitioner as to items (c), (d) and (e); (Prior record 548); by Prudence Realization Corporation as to item (a) (Prior Record 552-3) and by Bank of Manhattan Co., as to item (e) (Prior record 555). Mr. Miller and Weil, Gotshal & Manges, Esqs. did not appear in the proceeding relating to the Ninth Series and filed no objections to said report.

All the objections were overruled and the report was confirmed by order dated February 27, 1947 (Prior record 520).

No appeal from said order was taken by Mr. Miller or by Weil, Gotshal & Manges, Esqs. Petitioner filed the sole appeal on behalf of the public bondholders as to items (c), (d) and (e) (Prior record 556). Prudence Realization Corporation appealed from said order as to item (a) (Prior record 557) and Bank of Manhattan Company appealed therefrom as to item (e) claiming it was entitled to said item by way of recoupment or subrogation (Prior record 560).

In the proceeding relating to the Sixth Series an order was made on February 27th, 1947, from which order Prudence Realization Corporation was the only appellant (R. 239).

With respect to the order made February 28th, 1947, relating to All series of Prudence Bonds, except the Fifteenth, the only appellants were George E. Eddy, by his

attorney, the petitioner Silbiger, and Prudence Realization Corporation (R. 239). (Prior record 480, 481.)

By the decision of the District Court and the four orders determining the rights to distributive shares in the respective trust funds, the amounts involved were in

Series AA the sum of	$ 288,599.29
Series 5 the sum of	360,610.22
Series 6 the sum of	182,249.72
Series 8 the sum of	207,368.21
Series 9 the sum of	463,285.24
Series 12 the sum of	209,116.50
Series 17 the sum of	135,840.99
Series 18 the sum of	84,383.62
	$1,994,453.79 (R. 169)

At the time of these allocation proceedings the deficiency in the payment of interest due to the Public Bondholders of the Fifth Series was $411,783.18 (R. 24); the deficiency in the interest due on the publicly held bonds in the Ninth Series was $604,606.17 (R. 40); such deficiency in the Sixth Series was $251,405.28 (R. 34); and in each of Series AA, 8th, 12th, 17th and 18th the deficiency of interest due the public bondholders exceeded the amount in the funds in excess of what was required to meet the principal due on their bonds (R. 47).

In Series A,* Third, Fourth, Seventh, Tenth, Eleventh, Thirteenth, Fourteenth, Fifteenth, Sixteenth and Eigh-

*On October 6, 1949, counsel entered into a stipulation whereby the litigation over the Account of Guaranty Trust Co. as Trustee of Prudence Bonds, Series A, was settled and compromised by the payment by the Trustee of $315,000 into the Series A Trust Fund. This settlement was approved by order dated November 16, 1949 and there was directed to be paid to Series A Public Bondholders the $6,559 principal of their bonds and $238,762.54 the deficiencies of interest due thereon and computed to October 1, 1949. For services in connection with said accounting, counsel fees were awarded as follows: To Charles M. McCarty, Esq. $10,000, George C. Wildermuth, Esq. $9,500, petitioner $2,000, Executors of Joseph Nemerov, Esq. dec'd. $1,500.

teenth, the collateral was insufficient to pay the principal of the outstanding publicly held bonds (R. 248, 665).

The several appeals from the four orders relating respectively to the Fifth, Sixth, Ninth and All Series except the Fifteenth, were on motion by petitioner consolidated into one record (R. 241), and the appeals were argued on behalf of the Public Bondholders by Petitioner Silbiger on October 7, 1947 (R. 260, 451).

The decision of the Court of Appeals was rendered on December 8, 1947, reversing the decision below. (*Eddy* v. *Prudence Bonds Corporation*, 165 F. 2d 157.)

Petitions to the Court of Appeals by Prudence Realization Corporation and Reconstruction Finance Corporation for a rehearing predicated on the alleged ground among others that the Court "Mistakenly assumed the controversy was between the Publicly-Held Bonds on one side and Guarantor (predecessor of Prudence Realization Corporation) on the other" were denied on January 5, 1948, (R. 261).

About February 6, 1948 Prudence Realization Corporation filed its petition and brief for a writ of certiorari—said petition being predicated in part on an allegation that the Court of Appeals "approached the issue in the case upon the mistaken assumption that this was a controversy between the Publicly-Held Bonds, on the one side, and the Subordinated Bonds, on the other * * * and concluded by saying "We sustain the position of the Publicly-Held Bonds" (R. 261).

Briefs in support of granting such writ were filed by counsel for Prudence-Bonds Corporation and the Trustees of the Debtor, as also by Reconstruction Finance Corporation (R. 27-8). Briefs in opposition were filed by petitioner and Weil, Gotshal, & Manges, Esqs. and this Court denied the petition on March 8, 1948 (R. 28, 262).

Petitioner thereafter filed several petitions, entitled respectively in the Fifth, Sixth, Ninth and All Series allocation proceedings praying compensation for his services

therein, and determining the benefits accruing to the public bondholders in the respective trust funds and the establishment of his lien for services on the respective trust funds as follows:

	Value of Benefits Conferred		*Amount of Lien Claimed*	
Series AA	*$274,166.27	(50)	$60,300	(50)
Series 5th	347,498.50)			
	81,564.14)	(28)	85,000	(29)
Series 6th	180,000.00	(37)	40,000	(37)
Series 8th	268,855.71	(50)	59,200	(50)
Series 9th	462,197.91)			
	46,631.51)	(43)	112,000	(50)
Series 12th	253,508.71	(50)	55,750	(50)
Series 17th	135,826.14	(50)	29,900	(50)
Series 18th	78,758.12*	(50)	17,350	(50)

Objections to the compensation requested by petitioner were interposed by Prudence Bonds Corporation (R. 112-4) and Reconstruction Finance Corporation (R. 148).

Reconstruction Finance Corporation appeared by counsel in the construction and allocation proceedings in the District Court. When the Court of Appeals reversed the lower court and Prudence Realization Corporation applied for a re-hearing of the appeals, Reconstruction Finance Corporation filed a petition for leave to join in the "petition for re-hearing of the appeals filed by Prudence Realization Corporation simultaneously herewith and for the same reasons as set forth in said petition * * *" (R. 241). (See Silbiger Ex. 4.) Neither of said petitions for re-hearing disclosed the nature of Reconstruction Finance Corporation's interest.

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*The variance between the sums as above set forth in said petitions and as stated by the Special Master's Report (R. 247) arises because the former are predicated on the status of the respective funds as existing and shown in the allocation proceedings as of August 31, 1946. (R. 165, F. 2d 157, pp. 450-77.) The Special Master's report is based on the status of the trust funds as of August 31, 1948 (R. 625, 662).

On the petition of Prudence Realization Corporation for writs of certiorari Reconstruction Finance Corporation as Respondent filed a memorandum in support of the writs, disclosing therein that Prudence Realization Corporation held $1,910,300 of subordinate bonds and R. F. C. has a participation of 16% in the assets of said petitioner; that in addition thereto R. F. C. through wholly owned subsidiaries held $203,856 (original face amount $568,700), of unsubordinated or publicly held bonds, including bonds in various Series in which the collateral is insufficient to pay the full principal (Silbiger, Ex. 5).

The Parties and their relationship to these proceedings:

(a) Prudence Bonds Corporation (new corporation) is the corporation created pursuant to the plan of reorganization of Prudence Bonds Corporation, Debtor, the issuer of the Eighteen Series of Prudence Bonds. It succeeded the Debtor corporation, and since as of March 1st, 1938 has serviced the collateral underlying the said bond issues under the terms of Eighteen Supplemental Trust Agreements entered into between it and City Bank Farmers Trust Company, as successor trustee (R. 216, 217).

(b) Prudence Realization Corporation was created to succeed The Prudence Company, Inc., guarantor of the Eighteen series of bonds issued by Prudence Bonds Corporation (R. 212). It became the holder of the $1,910,300 of the subordinate bonds owned by the guarantor (R. 213). It is the holder of unsubordinated or publicly owned bonds aggregating $30,100 of which $13,400 are bonds in Series Fifth, Eighth and Ninth, which are so-called "Surplus Series" and $16,700 consist of bonds in the Third, Thirteenth and Fifteenth Series, so-called "Deficit Series" (R. 672).

(c) Reconstruction Finance Corporation has a 16% interest in the assets of Prudence Realization Corporation (R. 445). It has a beneficial interest to the extent of 10%

of the stock of Prudence Bonds Corporation (R. 443) and in the holder of all the capital stock of Realty Associates Securities Corporation and Realty Associates, Inc. (R. 444). Through its wholly owned or controlled subsidiary corporations, it was the beneficial owner of unsubordinated bonds aggregating $707,800 (R. 672, 673, 674) including a $1,000 bond of the 4th Series, and $28,500 of bonds in the 11th Series, $20,400 in the 3rd series, and $109,500 in the 13th Series, which are "Deficit Series" (R. 672). It was represented by counsel and participated in the proceedings relating to the allocations and distributions of the Trust Funds securing the Eighteen Series of Prudence Bonds (R. 439). Mr. Jerome Thralls is the Special Representative of the Reconstruction Finance Corporation.*

(d) The petitioner is the attorney for George E. Eddy, holder of bonds in eleven of the eighteen Series of Prudence Bonds, of which $6,000 were in "Surplus Series" and $11,000 were in "deficit series" (R. 675). As attorney for Mr. Eddy he appeared in the proceeding for the Reorganization of Prudence Bonds Corporation, Debtor, and filed objections to the original plan proposed insofar as it sought to discharge the debt of The Prudence Company, Inc. on its guaranty of the bonds and to preserve an equity for the Debtor without the full payment to the bondholders of their bonds according to their tenor (Prior Record 212, 213). When the original plan was amended and there was incorporated therein paragraph 11, thereby preserving the priority rights of the bondholders, petitioner rendered no further substantial services in connection with the formulation, adoption or confirmation of the plan (R. 295).

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*Mr. Thralls was a director of both Prudence Bonds Corporation (new corporation) and Prudence Realization Corporation (S. M. 81) Mr. William T. Corwin was a director in both corporations, and three of the remaining five directors of Prudence Bonds Corporation, were formerly directors or officers of Prudence Bonds Corporation, issuer of the bonds or The Prudence Company, Inc. the guarantor of the bonds and predecessor of Prudence Realization Corporation (S. M. 81, 82).

When by an order dated January 9, 1939, the District Court limited its jurisdiction over the accounts of the Indenture Trustee to their acts subsequent to June 29th, 1934, the date the petition for reorganization of Prudence Bonds Corporation was filed, petitioner obtained leave to intervene on behalf of Mr. Eddy (R. *Eddy* v. *Kelby*, 332 U. S. 836, p. 109) and appealed to the Court of Appeals for the Second Circuit, and was instrumental in securing a reversal of the said order. (*Central Hanover Bank & Trust Co.* v. *President and Directors of the Manhattan Co.*, 105 F. 2d 130.)

Thereafter, about the fall of 1939, petitioner as attorney for Mr. Eddy, his sister Bessie B. Reilly, and Katherine Born filed objections to the accounts of the Indenture Trustees as aforesaid (*supra*, p. 5).

The issues raised by said accounts and objections thereto related solely to alleged acts of misfeasance or nonfeasance of the respective trustees in the administration of the trust estates prior to the filing by Prudence Bonds Corporation of its petition for re-organization in June, 1934.

(e) All the public bondholders in Series A.A., 5th, 6th, 8th, 9th, 12th, 17th and 18th, the "Surplus Series". These bondholders were brought in as parties by the service of process on petitioner as attorney for Mr. Eddy, by publication of notice, and the appearance of petitioner on their behalf (R. 229).

(f) All the public bondholders in Series A, 3rd, 4th, 7th, 10th, 11th, 13th, 14th, 15th and 16th, the Deficit Series. These bondholders were brought in as parties by service of process on Prudence Realization Corporation, Reconstruction Finance Corporation, the committee for 16th Series bondholders and other committees designated by the Court, by publication of notice, and the appearance by Prudence Realization Corporation and Reconstruction Finance Corporation, holders of bonds in deficit series (R. 229).

Decisions Below

For his services in successfully thwarting what the Court of Appeals for the Second Circuit characterized as both "illegal" and a "spoliation of the beneficiaries of the trusts, the publicly held bonds" (165 F. 2d 157 at 161), in the sum of approximately $2,000,000 the Special Master, Thomas M. Healy, Esq. recommended that petitioner should be awarded $75,000 and overruled the objections among others that petitioner was disloyal to his clients, or represented conflicting interests (R. 251, 252, 273). The report of the Special Master was confirmed by the District Court (R. 10).

On the appeal of Prudence Bonds Corporation and Reconstruction Finance Corporation (R. 7, 9) the Court of Appeals for the Second Circuit reversed the District Court and adjudged that petitioner Silbiger in the Construction Proceeding was disloyal to his clients Mrs. Born and Mrs. Reilly (R. 757, 759) and that he was the attorney not only for Mr. Eddy, Mrs. Reilly and Mrs. Born, but also for all public bondholders in all deficit series in the accounting proceedings of which he had appeared, and that "when he argued the side of the "Surplus Series" in the "Construction Proceeding", it conflicted with his duty to all the bondholders of any "Deficit Series" (R. 759). The court directed that the District Court reduce the allowance to petitioner by at least one-third (R. 761).

Specifications of Errors to be Urged

The Court of Appeals for the Second Circuit erred:

1. In rejecting the findings of fact made by the Special Master and confirmed by the District Court that petitioner was not the attorney for Mrs. Born and Mrs. Reilly in the "Construction Proceedings" and owed no duty to them or other holders of "Deficit Series" Bonds.

2. In reversing the District Court and finding that petitioner was "disloyal" to his clients and represented conflicting interests.

3. In failing to rule that only the alleged client whom an attorney represents can question the attorneys' rights to represent a conflicting interest, and that the proper procedure is to move to disqualify the attorney or compel him to withdraw from the case.

4. In making a finding after limiting the appeal before it to the single issue of the "alleged conflict of interest represented" which was the only issue briefed or argued by petitioner, that "all the issues" have "been fully argued", and predicating thereon its conclusions of what it "should regard as an abuse of discretion".

5. In construing Section 250 of the Bankruptcy Act as applicable to the instant proceeding.

6. In failing to take cognizance of and reviewing the whole case on the merits.

And that the District Court erred:

a. In its ruling that it could not substitute its "own view for those expressed by the Special Master".

b. In failing to arrive at its own independent informed opinion as to the value of petitioner's services.

c. In failing to apply the rule in New York State as to what constitutes a reasonable counsel fee for services rendered on a contingent basis, and failing to find that the fees requested by petitioner were fair and reasonable within such rule.

Reasons for granting the Writ

The decision below involves the proper relationship between attorney and client, as also between attorneys and the Court, as well as the proper application of the law and Federal Procedure to the alleged misconduct of an attorney.

While it may not be a matter of general concern whether petitioner received a just compensation by being awarded $75,000 for his services, or if he was entitled to considerably more or less, as that affects merely his financial status or position, a far different situation is presented when an attorney, after practicing for 49 years is unjustly adjudged to have been disloyal to his clients and is thus branded as unfit and unworthy to belong to the brotherhood of the Bench and Bar. As a corallary to the duty of the Court to inflict just penalty upon an attorney whose misconduct may impair or defeat the due administration of justice, there arises a reciprocal duty in the Court to defend and protect the good character of an attorney and exonerate him when he is unjustly charged and improperly found guilty of faithlessness and disloyalty to his client or of malpractice and being a discredit to his profession. Petitioner strenously urges that the finding of disloyalty and of a conflict of interest is not supported by any evidence; that the Special Master's finding of his disinterestedness and fidelity is amply justified by the evidence; and that he acted in good faith, in furtherance of the true administration of justice and that this court should completely exonerate him and clear his name as a reputable member of the bar.

Wherefore, your petitioner respectfully requests that certiorari be granted as prayed.

SAMUEL SILBIGER, *pro se,*
Attorney for Petitioner.

Dated: May 17th, 1950.

UNITED STATES OF AMERICA }
STATE OF NEW YORK } ss.:
COUNTY OF KINGS }

SAMUEL SILBIGER, being duly sworn, says he is the Petitioner herein.

That he has read the foregoing Petition and the statements therein contained are true as he verily believes.

SAMUEL SILBIGER

Sworn to before me this
17th day of May, 1950.

JACOB CARR
Notary Public, State of New York
No. 24-5625500
Qualified in Kings County
Cert. filed with Kings Co. Reg.
Term Expires March 30, 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No.

SAMUEL SILBIGER,

Petitioner,

against

PRUDENCE BONDS CORPORATION (NEW CORPORATION) and RECONSTRUCTION FINANCE CORPORATION.

BRIEF IN SUPPORT OF PETITION

POINT I

Petitioner was not disqualified from representing the bondholders of the surplus series; he did not represent conflicting interests.

The Court below predicated its decision on the premise that "The recoveries in the accounting proceedings produced a fund to which the bondholders of the "Deficit Series" claimed to be entitled, *so far as they were not necessary to pay off the "Surplus Series"* and any other prior claims * * * and it would be an unreasonable limit upon the retainer of an attorney for "Deficit Series" bondholders to say that he did not undertake to collect his clients' share of *whatever the "Surplus Series" and other claimants did not absorb"* (Emphasis supplied). Assuming, arguendo, that petitioner was the attorney for the bondholders of "Deficit Series" it would not follow that any duty devolved upon him to attempt to despoil the Surplus Series bondholders and to collect for the deficit bondholders funds

which legally and equitably were necessary and required to meet the priority claims of such surplus Series bondholders.

It should be borne in mind that no bondholder of a deficit series except Reconstruction Finance Corporation and Prudence Realization Corporation challenged the priority right of the Surplus Series to the application of the trust funds to payment of their bonds in full with interest to the extent "permitted by law". Each challenger was represented by its own counsel. If any public bondholders of "Deficit Series" sought to make such challenge, as the appearance by petitioner in support of the right of the Surplus Series bondholders was open, unconcealed, and known to the Special Master and the Court, the proper procedure would be for such bondholders to move to disqualify petitioner and compel him to withdraw from the case. Absent such motions, the deficit series public bondholders acquiesced in and conceded the priority rights as claimed by the Surplus Series bondholders.

Bloomingdale Bros. v. *Hudson,* 147 Misc. 759; 264 N. Y. Supp. 639; *Watson* v. *Watson,* 171 Misc. 175, 11 N. Y. S. 2d, 537; *Packer* v. *Rapaport,* no official report, 88 N. Y. S. 2d, 118, reversed 89 N. Y. S. 2d, 703.

In *Lalance & Grosjean Mfg. Co.* v. *Haberman Mfg. Co.,* 93 F. 197, at 199 on such motion to disqualify an attorney the motion was denied, the Court stating:

> "It is thought that the honorable obligations of a reputable member of the bar is a better assurance that professional secrets will be respected than would be an order of the Court."

In *Smallwood* v. *Overseas Storage Co. Inc.,* 263 App. Div. 609; 33 N. Y. S. 2d, 876 Aff'd. 289 N. Y. 827 the rule of conduct applicable to attorneys is stated as follows:

> "The general rule is that a lawyer may not represent conflicting interests or undertake to discharge conflicting duties. There are exceptional instances when he may do so, when the conflict of interest is

> negligible, or when there has been a complete disclosure. Except in the latter instance, acting for conflicting interests is always fraught with peril. (Eiseman v. Hazard 218, N. Y. 155, 159)".

See *Shaw* v. *Bill*, 95 U. S. 10; *Irwin* v. *Simmons*, 140 F. 2d 558; *Eiseman* v. *Hazard*, 218 N. Y. 157; *Haight* v. *Lloyd Royal Belge Societe Anonyme*, 217 App. Div. 656; 217 N. Y. Supp. 239; *In re Sielkens Estate*, 162 Misc. 54, 293 N. Y. Supp. 721, *Field* v. *Moore*, 189 App. Div. 709.

Obviously therefore it does not necessarily follow that because an attorney represents diverse interests, he must necessarily be subject to conflicting duties. Diverse interests may be recognized and adjusted without any conflict, as where, as in the instant case it is claimed that petitioner represented both priority and junior interests in trust funds. If the junior interests concede and acknowledge such priority rights there can be and is no conflict. On the other hand, if the junior interests dispute and challenge such priority claims, then of course a conflict arises and the same attorney cannot be the representative of both interests.

In the case at bar no clients for whom petitioner at any time appeared as counsel challenged the priority rights of the public bondholders of the Surplus Series. Actually the nature and extent of the priority rights of the public bondholders of all series were identical—and the determination of the rights of the public bondholders of all series, both surplus and deficit in their respective trust funds involved the interpertation of identical plans and contracts that applied to all public bondholders alike in both surplus and deficit series. There could be but one correct interpretation of the similar plans affecting the surplus and deficit series alike, and even on the assumption that petitioner was attorney for all the public bondholders, it would be his paramount duty to aid the Court in arriving at the correct determination of the law and the facts.

In Thornton on Attorneys at Law, vol. 2 § 816, p. 1229 the rule is stated:

> "It is the duty of the court to condemn such conduct in an attorney as may tend to impair or defeat the due administration of justice, or the usefulness of the bar, and to protect the State and the public from lawyers who abuse their clients or the courts. *So, under the accepted code of ethics, it is the duty of lawyers to aid the Court, in the causes in which they appear, in arriving at a proper determination of the law and the facts; theoretically, at least, it is counsel's first duty to see that the issue is justly decided, however his client may be affected thereby.* And if, by any act of commission or omission, an attorney deceives the court, and so obstructs or pollutes the administration of justice, or, by the suppression of the truth, obtains a result not warranted by the law, he is guilty of malpractice, and unworthy of the privileges which the law confers upon him" (Emphasis supplied).

In the case at bar, as the several plans were substantially identical in all eighteen series of Prudence Bonds, the rights of the public bondholders in each series were identical, and the extent of their equitable liens on the respective trust funds was the same whether the collateral was adequate or inadequate to discharge the lien. The lien of the public bondholders in both the deficit and surplus series on each trust fund was to the extent of the principal of their bonds with all accrued interest thereon. That was a priority lien which had to be satisfied in full before any subordinate lionnor could be entitled to any share in a distribution of the fund.

When Prudence Realization Corporation and Reconstruction Finance Corporation challenged the scope of the priority rights of the public bondholders, it became the duty of any counsel for public bondholders to defend their rights—to aid the court in arriving at a proper determination of the law and fact. He became, in effect, counsel "for

the situation", in duty bound to uphold the law and the proper administration of justice. That duty was the same whether counsel represented bondholders in the surplus or deficit series.*

POINT II

Petitioner, in the construction proceeding, was not the attorney for any bondholder in the deficit series.

Concededly, in the construction proceedings, petitioner appeared and acted for his client George E. Eddy (R. 297) and accepted a contingent retainer to advocate and protect the priorty rights of the public bondholders and performed his duties with fidelity (R. 252). He did not appear for or purport to represent Katherine Born or Bessie B. Reilly or any holder of Prudence Bonds of the Fourth and Eleventh Series (R. 298).

Obviously therefore, petitioner did not purport to act for or represent conflicting interests and thereby deceive and impose upon the Court, and thus pollute or obstruct the administration of Justice. The criticism of his activities in the proceeding reduces itself to a charge that petitioner failed to perform some duties he owed to Mrs. Born and Mrs. Reilly and the bondholders in the deficit series by reason of his appearance for and representation of them in prior accounting proceedings.

Of course, even after the relationship of attorney and client terminates, the duty of loyalty of the attorney to the client still survives, and he violates that duty when he places his services at the disposal of adversaries of

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*The lower court decided that petitioner "when he argued the side of the Surplus Series", it conflicted with his duty to all bondholders of any "Deficit Series". Among the deficit series was Series A. (R. 212, 247) which by a subsequent settlement of the accounting proceeding with Guaranty Trust Co. approved November 16, 1949, was converted to a Surplus Series and through petitioner's services the A Series bondholders' rights to interest in the sum of $238,762.54 was in fact protected.

his former clients with respect to matters which might involve a breach of his duty to hold inviolate confidential communications received or obtained by him in the course of such employment to the prejudice or disadvantage of such former clients.

U. S. v. *Bishop*, 90 F. 2d 65; *Watson* v. *Watson*, 171 Misc. 175; 11 N. Y. S. 2d, 537; *Loew* v. *Gillespie*, 90 Misc. 616; aff'd 173 App. Div. 889.

But there is no principle of law or ethics which debars an attorney from accepting engagements by adversaries of his former client where the issues involved are different from or outside the scope of such former employment and do not involve a disclosure of confidential communications. In such case the reason for the rule fails.

Irwin v. *Simmons*, 140 F. 2d, 558; *In re Sielken's Estate*, 162 Misc. 54, 293, N. Y. Supp. 721.

In any event the only person who may complain is the client.

Eiseman v. *Hazard*, 218 N. Y. 157; *7 C. J. S. Attorney and Client*, 827, §47; *Michel* v. *McKenna*, 199 Wis. 608, 611, 237 N. W. 396, 398.

Prudence Bonds Corporation, and Reconstruction Finance Corporation were at no time clients of petitioner and they have no right to any voice in the selection of counsel for their adversaries. The only parties who could complain are the former clients of petitioner—and like any other rights possessed by them they can be and were waived in this proceeding. *Michel* v. *McKenna, supra.*

But in law and fact the relationship of petitioner as attorney for the bondholders in the deficit series terminated upon the entry of the final decrees in the accounting proceedings. The proceeding relating to the Fourth Series involved the accounts of City Bank Farmers Trust Company under a trust agreement dated October 15, 1924 made with the old Prudence Bonds Corporation. Such contested accounting was settled and compromised and the final decree was entered on February 21, 1941. The accounting of Chicago Title and Trust Company as Trustee of the

Eleventh Series related to a similar trust agreement dated December 1, 1927. The controversy was likewise compromised and settled and the final decree entered April 7, 1944. Similarly, in the Sixteenth Series, the accounts of Marine Midland Trust Company of New York, under a Trust Agreement dated February 1, 1929 were compromised and settled and final decree entered February 21, 1941.

When in the *Fall of 1939* petitioner accepted the contingent retainer to represent the bondholders and prosecute their claims against said Trustees for alleged misfeasance under their respective trust indebtures, it was not known or contemplated that a possible controversy would arise six years later, in 1945, as to the rights of the bondholders in said series—not under said trust indentures or against said trustees but under the plan of reorganization of the old corporation and trust indentures entered into by the new corporation with City Bank Farmers Trust Company as of March 1, 1938. The issues raised and presented in the construction proceedings were in no sense incident to the issues within the scope of the accounting proceedings, and the ruling of the Court below that the retainer of petitioner in such accounting proceedings bound him to represent the same clients in the "Construction Proceeding" is unsupported by any precedent and opposed to all reason and common sense. The authorities are contrary to such ruling.

Weiner v. *Jones*, 245 App. Div. 17, 279 N. Y. Supp. 799; *Czupryna* v. *Strawinski* (no official report), unofficially reported in 50 N. Y. S. 2d 633.

While the general rule that an attorney's employment terminates upon entry of judgment or decree has been relaxed in circumstances relating to proceedings to enforce the judgment or decree or to receive service of motions directed to correct same for error or irregularity, *Ohlquist* v. *Nordstrom*, 143 Misc. Rep. 502; *Freeman, Judgments* (5th Ed.) § 353 such exceptions to the rule have no application to the situation in this case.

Even on the tenuous theory of the Lower Court that the "accounting proceedings" and the "construction proceedings" were part of the reorganization of the old Prudence Bonds Corporation, different phases of the administration of the debtors' estate in reorganization, the prior appearance of petitioner as attorney for bondholders of the deficit series in the accounting proceeding on a purely contingent basis, cannot justify an inference that he was authorized to act, or accepted a contingent retainer to act as their attorney in the subsequent "construction proceeding". Like any proceedings involving estates, each step in the administration involved different parties; each was initiated by separate petition and the service of separate process; each involved separate issues of fact and law. *Matter of Rosenberg's Estate,* 157 Misc. 490; *In re Rosenberg's Will,* 164 Misc. 837.

The rationale of the lower court reduces itself to a finding that petitioner "failed in his duty when he did not present this matter to the court and learn its pleasure". But, it is not asserted or shown that the Court was unaware of the situation. It directed that process be served on Mr. Eddy's attorney (R. 229, 230, 235, 237). It knew that petitioner was the attorney for Mr. Eddy, and that he had appeared in the accounting proceedings for Mrs. Born in the Fourth Series and Mrs. Reilly in the Eleventh Series, and had awarded him counsel fees for his services. By directing that process to be served on Reconstruction Finance Corporation, Prudence Realization Corporation, the committee of the 10th and 16th Series which were deficit series, and all other committees who appeared in the reorganization proceeding, it knew that all diverse interests would be properly and adequately advocated and protected. Certainly, if Prudence Bonds Corporation believed that the interests of the deficit series bondholders were not being adequately represented by Reconstruction Finance Corporation and Prudence Realization Corporation, as it professes to represent all bondholders in all surplus and deficit series, the duty rested on it, if on any one, to direct the

attention of the Court to the situation with which it was already familiar, and "learn its pleasure".

Research by petitioner has failed to discover any case with the unique situation as in the case at bar. In the nearest analogous case *In re Wilson,* not officially reported, unofficially reported in 170 N. Y. Supp. 725 at 731, the Court said:

> "The acceptance by Coombs & Wilson of a retainer, and their institution of a suit to recover the property for the sisters was not inconsistent with their previous action as attorneys to probate the will and settle the estate of William Z. King, but was entirely consistent with it. And the fact that the firm four years before had brought a suit for dower and had drawn wills for Mrs. King, did not prevent their acting for the sisters of Mr. King against the legatees of Mrs. King. The work done for Mrs. King related to entirely different subjects and had long been closed. The fact that Mrs. King claimed that she had a right to dispose of the property by will, and that she made a will bequeathing it to her relations, seems to me entirely immaterial.
>
> * * *
>
> The general rule is, of course, fundamentally that an attorney who has been retained and has acted for a client cannot subsequently accept a retainer from or act for others whose interests are adverse to his client. The question here is whether Mr. King's sisters and sister's children had interests ad verse to Mrs. King's, either individually or as Executrix of her husband's will. I cannot see that they had. Mrs. King's interest under her husband's will was to have the use of the personal property during her life, with the right to dispose of it or of any part of it during her life. That right was never contested."
>
> * * *

POINT III

Section 250 of the Bankruptcy Act is inapplicable to this proceeding.

POINT IV

The compensation awarded to petitioner is inadequate and contrary to established precedent.

Petitioner discussed, in substance, Points III and IV on the petition for writs of certiorari to review the intermediate orders of the Court below, dismissing his appeal taken as of right and denying him leave to appeal, if such leave was required by law. Said writs were denied by this Court on April 24, 1950. These questions are of secondary importance and will be germane only if this Court grants a review of all questions on the merits, and therefore petitioner refrains from trespassing on the Court's valuable time by a further discussion thereof.

POINT V

The petition for a writ of certiorari should be granted.

Dated, New York, May 17, 1950.

SAMUEL SILBIGER,
Counsel for Petitioner, pro se.

Office - Supreme Court
FILED
JUN 28 195
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. [redacted] 78

SAMUEL SILBIGER,

Petitioner,

against

PRUDENCE-BONDS CORPORATION (NEW CORPORATION) and RECONSTRUCTION FINANCE CORPORATION.

BRIEF OF RESPONDENT PRUDENCE-BONDS CORPORATION (NEW CORPORATION) ON PETITION FOR WRIT OF CERTIORARI

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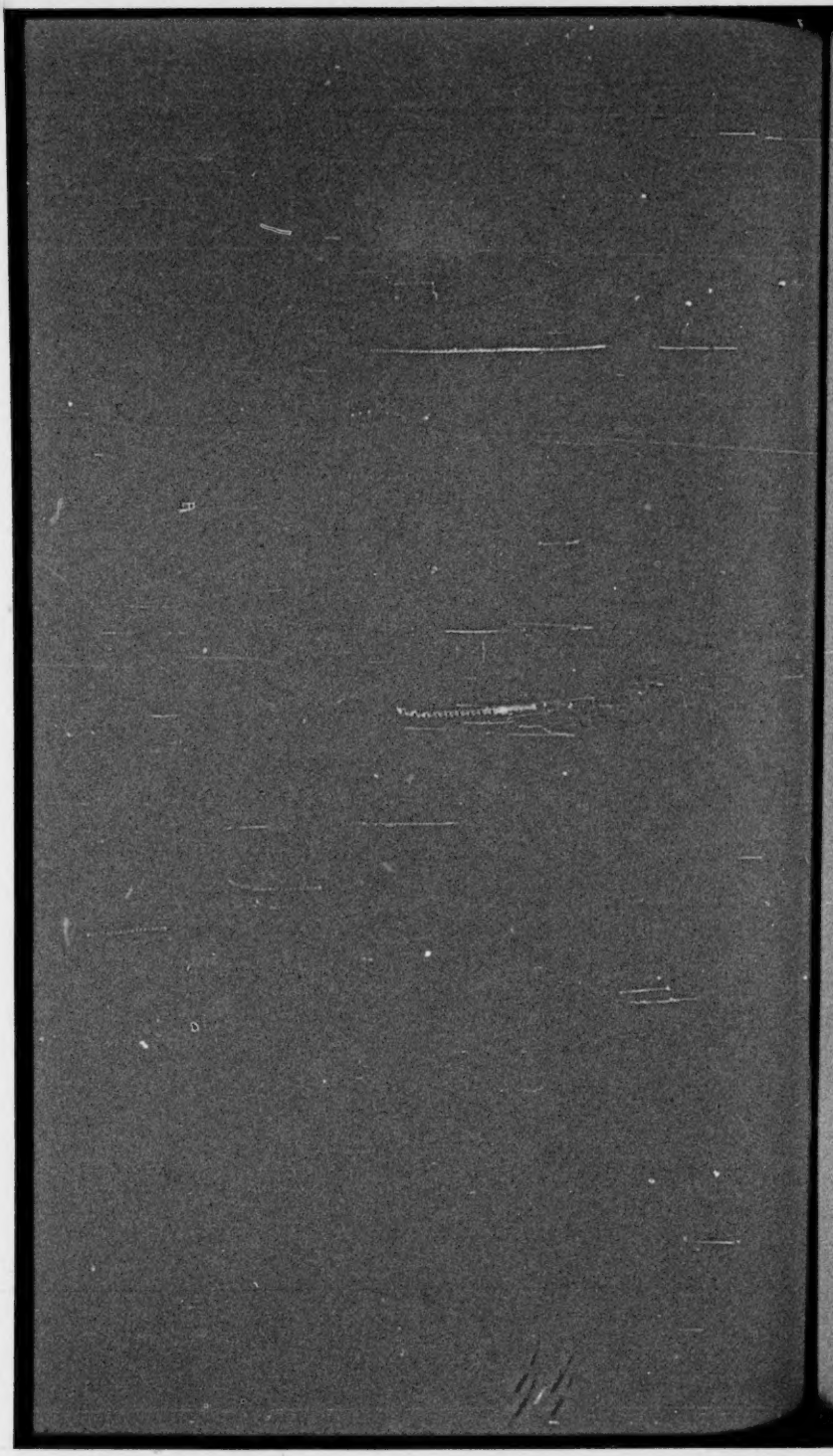

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 829

SAMUEL SILBIGER,

Petitioner,

against

PRUDENCE-BONDS CORPORATION (NEW CORPORATION) and RECONSTRUCTION FINANCE CORPORATION.

BRIEF OF RESPONDENT PRUDENCE-BONDS CORPORATION (NEW CORPORATION) ON PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals for the Second Circuit dated March 7, 1950 (R. 755), is reported 180 F. 2d 917. The opinion on rehearing (R. 785) is reported 180 F. 2d 923. The opinion of the District Court Judge is not reported (R. 318).

Jurisdiction

The decree of the Court of Appeals, Second Circuit, was entered on March 7, 1950 (R. 765). Petitions for rehearing

filed in that Court by petitioner (R. 779) and by respondent (R. 766) were denied on April 5, 1950 (R. 786), although the Court on the said petition of respondent amended its opinion (R. 785).

Petitioner invokes the jurisdiction of this Court under Title 28, Section 1254(1) of the United States Judicial Code, and Section 24(c) of the Bankruptcy Act, as amended, 11 U. S. C., Sec. 47(c).

Other Petition Pending

A petition of respondent Prudence-Bonds Corporation for a writ of certiorari to review the decree of the Court of Appeals for the Second Circuit, dated March 7, 1950, is pending undetermined (*Prudence-Bonds Corporation (New Corporation)* v. *Silbiger, et al.*, No. 785, October Term, 1949). With respect to petitioner Silbiger, the substance of the questions raised by respondent's petition is whether an attorney who represents conflicting interests in a corporate reorganization proceeding should be denied any allowance for his services.

Petitioner's Questions

The petition presents six questions.

Questions numbered "4", "5" and "6" do not relate to the decree of March 7, 1950, which petitioner seeks to review. These three questions relate to two prior orders of the Court of Appeals, Second Circuit; one of which, dated October 21, 1949, denied petitioner Silbiger's application for leave to appeal the order of the Bankruptcy Court awarding allowances to petitioner Silbiger and others; the second of such orders, dated November 7, 1949, dismissed, on motion of respondent, an appeal petitioner Silbiger sought to take from the order on allowances as a matter of right by filing a notice of appeal. Petitioner Silbiger's

object in attempting to appeal the order on allowances was to increase the allowance of $75,000.00 awarded to him (R. 10); he had applied for an allowance of $459,500.00 (R. 158). This Court on April 24, 1950, denied a petition of petitioner Silbiger and his client George E. Eddy for a writ of certiorari to review the said two prior orders of the Court of Appeals, Second Circuit (*Eddy and Silbiger* v. *Prudence-Bonds Corporation, et al.*, No. 546, October Term, 1949.)*

There is, therefore, no basis or jurisdiction to review questions "4", "5" and "6".

Petitioner's questions "1", "2" and "3", while relating to the decree of March 7, 1950, involve primarily the question whether on the facts of this case petitioner represented conflicting interests. The Court below, taking petitioner's version of the facts as true, found that he did (R. 756-761).

Petitioner's Specifications of Errors

Petitioner's specifications of errors numbered "4", "5", "6", "a", "b" and "c" (petition, p. 21) also relate to the above mentioned prior orders of the Court of Appeals, Second Circuit, which this Court declined to review in *Eddy and Silbiger* v. *Prudence-Bonds Corporation, et al.*, No. 546, October Term, 1949.† Specifications of errors numbered "1", "2", "3" and "4" relate to the decree of

* On an earlier occasion in this reorganization petitioner Silbiger and Eddy, in an effort to increase a prior allowance of $6,000.00 awarded to petitioner Silbiger, sought to raise the same questions and their petition was denied (*Eddy* v. *Kelby*, 319 U. S. 755). On still another occasion, this Court denied a petition of petitioner Silbiger to review an order of the Court of Appeals, Second Circuit, affirming an order of the Bankruptcy Court awarding petitioner Silbiger an allowance of $40,000.00 (*Eddy* v. *Kelby*, 163 F. 2d 56, cert. denied, 332 U. S. 836).

† Points III and IV of petitioner's brief (p. 34) also relate to matters which this Court declined to review in No. 546, October Term, 1949.

March 7, 1950, and the substance of these specifications is that the Court below erred in determining on the facts of this case that petitioner Silbiger represented conflicting interests.

Statement

In the proceedings for reorganization of Prudence-Bonds Corporation under the Bankruptcy Act, a proceeding (called for convenience the "Construction Proceeding") was had to construe a confirmed Plan of Reorganization, and involved, in part, a contest over priorities among two classes of bondholders, one class being called Surplus Series, the other Deficit Series. Petitioner Silbiger represented bondholders of both classes. Without consent of his clients or court authorization petitioner Silbiger advocated in the Construction Proceeding the interests of his Surplus Series clients and opposed the interests of his Deficit Series clients. The Surplus Series won the contest on an appeal prosecuted by petitioner Silbiger and others. Petitioner Silbiger was awarded an allowance of $75,000.00 payable by the Surplus Series. On appeal by respondent and Reconstruction Finance Corporation, the Court below held that petitioner Silbiger represented conflicting interests and was disloyal to one of the interests, but confessing to a departure from the established "rule of undivided loyalty", which requires denial of all compensation to an attorney serving conflicting interests, held he may nevertheless have an allowance on a reduced basis on the ground "there is a distinction between a corporate reorganization and an ordinary suit *inter partes*" (R. 760).

When the Debtor, Prudence-Bonds Corporation, went into reorganization it had outstanding eighteen Series of bonds aggregating approximately $56,000,000.00 (R. 212). Each Series was secured by Trust Fund collateral under a Trust Agreement made by the Debtor to a Bank, as

Trustee (R. 212). As each Series had separate collateral, some Series were better secured than others (R. 671-672). The bonds of all Series were guaranteed by The Prudence Company, Inc., which itself held $1,910,300.00 principal amount of the bonds, including some bonds of each Series (R. 212-213).

During the reorganization the Debtor was found to be insolvent (R. 213). The bonds held by the Guarantor were subordinated to the bonds of each Series in the hands of the public (R. 214). The Guarantor itself went into reorganization, was found to be insolvent and was succeeded, under a Plan of Reorganization, by a new corporation named Prudence Realization Corporation, which thereupon became the holder of the subordinated bonds (R. 212).

The Plan of Reorganization of Prudence-Bonds Corporation, consisting of a separate Plan for each bond Series and a General Plan, was confirmed in 1938; the separate Series Plans, except one, were all substantially the same (R. 215). The General Plan provided for a new corporation, also named Prudence-Bonds Corporation, to be owned by the bondholders; the separate Series Plans for an extension of the maturity of the bonds and changes in interest provisions (R. 119, 215). Eleven Banks had been Trustees of the bond Series (R. 120). Under the Plan, one Bank became Trustee of all Series under a Supplemental Trust Agreement with petitioner (R. 215). Upon confirmation, jurisdiction was reserved to carry out the Plan (R. 215).

As part of the proceedings to carry out the Plan, the bankruptcy court, among other things, authorized and directed the former Bank Trustees of the bond Series to account in the reorganization court for their acts as Trustees (R. 217). There then ensued extensive litigation relating to the accounts which has been the subject of several

decisions of the District Court, the Court of Appeals and several petitions for certiorari.*

The Construction Proceeding, in respect of which the instant allowances were awarded, was instituted in the fall of 1945, following collection of a large judgment against one of the accounting Bank Trustees (R. 121-122).† The questions in the proceeding arose in this way:

The Trust Funds of the Surplus Series had collateral sufficient to pay the principal of the publicly held bonds of the Series and leave an excess in principal account, but the excess was not sufficient to pay the arrears of interest at the original bond rate (R. 562-564, 665). The Trust Funds of the Deficit Series (which constitute the majority of the 18 Series) are insufficient to pay the principal of the publicly held bonds (R. 665). The Plan provided that interest on the bonds was payable at the rate of 5½%, but only to the extent that income on the Trust Fund Collateral would suffice, and, in substance, that no payments of principal or interest were to be made on the subordinated bonds until the publicly held bonds of the Series were paid in full (Prior record, ‡ pp. 111-113,

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* *Central Hanover B. & T. Co.* v. *President and Directors of the Manhattan Co.*, 105 F. 2d 130; *Manufacturers Trust Co.* v. *Kelby*, 125 F. 2d 650, cert. denied, 316 U. S. 697; *Brooklyn Trust Co.* v. *Kelby*, 134 F. 2d 105, cert. denied, 319 U. S. 767; *President and Directors of the Manhattan Co.* v. *Kelby*, 57 F. Supp. 839, modified and affirmed, 147 F. 2d 465, cert. denied, 324 U. S. 866; *Eddy* v. *Kelsey*, 148 F. 2d 323; *In re Prudence-Bonds Corporation*, 76 F. Supp. 643; see also *Eddy* v. *Kelby*, 319 U. S. 755, and *Eddy* v. *Kelby*, 163 F. 2d 56, cert. denied, 332 U. S. 836, relating to allowances in the accounting proceedings.

† On the accountings in 15 of the 18 Series of bonds approximately $4,277,100.00 was recovered for the Trust Funds and allowances for services and expenses in connection therewith were heretofore awarded by the bankruptcy court (R. 227-228). The accountings in two Series are pending.

‡ "Prior record" refers to record on appeal in the Construction Proceeding, *Eddy* v. *Prudence-Bonds Corporation*, 165 F. 2d 157, cert. denied, 333 U. S. 845, which is an exhibit in the instant case, but was not printed since it is on file in the Court below and in this Court.

164). The Plan further provided that upon retirement of all bonds of a Series all collateral remaining in the Trust Fund was distributable, when liquidated, *pro rata* among the other Series then outstanding (Prior record, p. 155; R. 222-223). The purpose of this latter provision was to "enable the less fortunate to be benefited from an excess of collateral of the better issues" (Prior record, pp. 261-262; R. 671-672).

The main question which arose in the Construction Proceeding was how collateral in principal account of a Series in excess of an amount sufficient to pay the principal of the publicly held bonds of the Series was distributable among the three classes of creditors having an interest therein; namely, 1) the publicly held bonds, 2) the subordinated bonds, and 3) the other Series of bonds.* This in turn raised the question: When were the publicly held bonds to be deemed paid in full? Were they paid in full upon payment of principal with income interest only, or were they entitled to unpaid interest at the original bond rate to the date of final payment of the principal and to have such arrears of interest paid out of the corpus of the Trust Funds before any payments could be made to subordinate lienors? †

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* In the Fifth and Ninth Series there was an additional creditor. The Bank, which was the former Trustee, obtained, on payment of the surcharge recovered against it, liens of $85,825.00 and $88,124.98 on the Fifth and Ninth Series Trust Funds, respectively, which were subordinated to all bonds of the respective Series, including the subordinated bonds (R. 228), and thus had priority over the above mentioned class 3 creditors, namely, the other Series of bonds. In addition, the judgment against the Bank provided that if the bonds of either the Fifth or Ninth Series were "paid in full", the Bank could apply "for relief by way of repayment to it of any surplus remaining in the Trust Fund" (R. 228).

† Certain subsidiary questions relating to adjustment of funds between principal and income accounts were also involved in the Construction Proceeding, but these questions became moot by the decision of the Court of Appeals on the main question (*Eddy* v. *Prudence-Bonds Corporation*, 165 F. 2d 157).

To obtain a judicial determination of the question of construction, respondent and City Bank Farmers Trust Company, the new Trustee for all Series, petitioned the reorganization court for instructions (R. 228-229, 234-235, 236-237).

The issue was referred to a Special Master who reported, in substance, that the bonds were income bonds on which interest was payable only to the extent earned on the collateral (R. 131).

Under the Master's Report, collateral in Surplus Series was to be used, first, to pay the principal of the subordinated bonds of the Series, and the balance then remaining was distributable *pro rata* among the public bondholders of the Deficit Series, with the exception that in the Fifth and Ninth Series the above mentioned subordinate liens of the Bank were to be paid first out of collateral remaining after payment of the principal of the subordinated bonds of said Series respectively (R. 131). To illustrate, the Fifth Series is a Surplus Series. After payment of the principal of the Fifth Series bonds there remained $360,610.22, which, under the Master's Report, was payable, 1) $67,200.00 in full payment of principal of subordinated Fifth Series bonds, 2) $85,825.00 in full payment of the Bank's subordinate lien, and 3) $207,585.22 to the public bondholders of the Deficit Series *pro rata* (R. 665).

In the aggregate, under the Special Master's Report, the public bondholders of the Deficit Series would have received approximately $810,000.00 from the Surplus Series (R. 665).

The Master's Report was confirmed by the District Court (R. 237-239), and on an appeal prosecuted by petitioner Silbiger and Messrs. Weil, Gotshal & Manges the order of the District Court was reversed (*Eddy* v. *Prudence-Bonds Corporation*, 165 F. 2d 157), certiorari was denied (333 U. S. 845), and the Construction Proceeding was concluded in July, 1948 (R. 243).

Under the reversing order of the Court of Appeals (165 F. 2d 157), collateral remaining in principal account of a

Surplus Series is distributable on account of arrears of interest on the bonds of the Series at the original bond rate, with the result that neither the subordinated bondholder nor the Bank (as holder of a subordinate lien in the case of the Fifth and Ninth Series only), nor the public bondholders of the Deficit Series will receive any distributive share from the Surplus Series.

In the reorganization, petitioner Silbiger represented George E. Eddy, Katherine Born and Bessie B. Reilly (R. 248-249, 365, 368, 369, 513-522, 533, 543, 573-575). Mr. Eddy holds $16,000.00 of bonds of ten Series, $4,000.00 of which are of Surplus Series and $12,000.00 of Deficit Series (R. 248-249, 575, 665). Mrs. Born and Mrs. Reilly hold a total of $14,000.00 of bonds of three Series, all of which are Deficit Series (R. 249, 573-574, 665). The result successfully advocated by petitioner Silbiger in the Construction Proceeding was adverse to the financial interests of Mrs. Born and Mrs. Reilly, and to the financial interests of Mr. Eddy as holder of $12,000.00 of Deficit Series bonds. Under the order of the District Court, which petitioner Silbiger aided in reversing, the Deficit Series in which Mr. Eddy holds bonds would have received approximately $624,500.00 from the Surplus Series, and the Deficit Series in which Mrs. Born and Mrs. Reilly hold bonds would have received approximately $155,200.00 (R. 222-223, 248-249, 573-574, 665).

For his services in the Construction Proceeding, which were not extensive,* and the result of which adversely

* The Construction Proceeding involved, in substance, only three short hearings before the Master, one contested motion before the District Court, a consolidated appeal, a petition for rehearing and a petition for certiorari (R. 244-245). All papers prepared by petitioner Silbiger in all courts, exclusive of his briefs, totaled only 49 pages (R. 146-147). In his brief on the appeal in the proceeding, petitioner Silbiger stated, "In the case at bar no dispute as to any facts ever arose * * *. The only issues presented are issues of law, involving the interpretation of the plans * * *" (R. 288-289). In his brief in this court in opposition to the petition for certiorari, petitioner Silbiger stated, "No controversy of public interest or importance with respect to legal principles is involved" (R. 289).

affected the financial interests of two of his three individual clients and may have adversely affected his third client,* petitioner Silbiger requested an allowance of $459,500.00;† he was awarded $75,000.00 (R. 10, 158), which sum is subject to reduction under the decision of the Court below (R. 761).

I

Petitioner Silbiger represented conflicting interests.

Petitioner contends, in substance, that he did not represent conflicting interests for the reason that in the Construction Proceeding he "was not the attorney for any bondholder in the deficit series" (petition p. 29). This contention disregards the facts. Petitioner admits he was attorney in the Construction Proceeding for George E. Eddy (petition p. 29), and it is admitted that of the $16,000.00 of Prudence bonds held by Eddy, $11,000.00 are of Deficit Series (R. 248-249, 575, 665).‡

In addition, petitioner Silbiger is attorney in the reorganization proceeding for Katherine Born and Bessie B.

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* Petitioner Silbiger testified in the proceeding to fix his allowance that he did not know "how the results (of the Construction Proceeding) affected the financial interests of Mr. Eddy", and that he never "made the calculation whether he was better off one way or another" (R. 467).

† Respondent contended that the allowance requested by petitioner Silbiger "was so exorbitant as to shock the conscience of a court of equity" and justify denial of any allowance (R. 113, 114).

‡ Third Series, $2,000.00; Thirteenth, $1,000.00; Fourteenth, $3,000.00; Fifteenth, $2,000.00; Sixteenth, $3,000.00 (R. 248-249, 575, 665). In addition, Mr. Eddy holds a $1,000.00 Eighteenth Series bond (R. 248-249). The Master included the Eighteenth as a Surplus Series (R. 169), but on the basis of appraised values, as distinguished from "book values" used by the Master (R. 169, 246-247, 665), the Eighteenth Series has a deficit of $95,486.96 (R. 208). Thus, $12,000.00 of Eddy's $16,000.00 of bonds are of Deficit Series.

Reilly, who, as previously noted, hold a total of $14,000.00 of Prudence bonds, all of which are of Deficit Series (R. 249, 573-574, 665; see also, *infra* pp. 12-13.)

Thus, the result successfully advocated by petitioner in the Construction Proceeding adversely affected $26,000.00 out of a total of $30,000.00 of bonds held by his three individual clients. Moreover, as attorney for Eddy, as holder of bonds of Deficit Series, petitioner Silbiger, as the Court below held, represented all bondholders of the Deficit Series in which Eddy holds bonds and "when he argued the side of the 'Surplus Series' in the 'Construction Proceeding', it conflicted with his duty to all of the bondholders of any 'Deficit Series'" (R. 759). The financial interests of the bondholders of the six Deficit Series in which Eddy holds bonds were in conflict with the interests of the bondholders of the four Surplus Series in which Eddy also holds bonds. In advocating that collateral in Surplus Series was distributable as interest on the bonds of these Series, petitioner Silbiger necessarily contended that the surplus was not distributable, as the District Court had held, among bondholders he represented in the Deficit Series.

Petitioner Silbiger, as attorney for Eddy and all bondholders of Series in which Eddy holds bonds, was in the position of serving two masters. And he placed himself in that position deliberately, knowing he was treading on insecure ground. At one of the hearings in the Construction Proceeding, the Special Master pointed out the conflict to petitioner Silbiger by reminding him that he represented bondholders of Series other than the Fifth (a Surplus Series) and asking: Do "you love the Fifth Series more than you love the Sixth Series?" (R. 670). Petitioner Silbiger, moreover, testified at the hearings on the allowance applications that he had explained to Eddy that "there was a question of ethics involved, possibly, or a possible conflict of interest" (R. 409), but he also testified he did not discuss such question "with any other bondholders similarly situated to Mr. Eddy" (R. 409). He said

Eddy told him to proceed as he, Silbiger, thought "justifiable" and that Eddy said, "If I am not entitled to anything, to a certain sum of money in a particular Series, I don't want it" (R. 409). Eddy, however, testified more realistically; he said "of course" he anticipated that he would gain "more money" if petitioner Silbiger's appeal were successful than he would under the order of the District Court (R. 385).*

The fact that petitioner Silbiger represented conflicting interests is, therefore, clear enough from his representation of Eddy and bondholders of Series in which Eddy holds bonds. It becomes clearer in the light of the fact that petitioner Silbiger is also attorney in the reorganization for Bessie B. Reilly and Katherine Born. Mrs. Reilly is Eddy's sister (R. 368); Mrs. Born is the wife of Eddy's former factory superintendent (R. 248, 369). Neither Mrs. Born nor Mrs. Reilly holds any bonds of Surplus Series. Mrs. Born holds $3000 of Fourth Series bonds and $3000 of Sixteenth Series bonds; Mrs. Reilly holds $8000 of Eleventh Series bonds (R. 249, 573-574). The Fourth, Eleventh and Sixteenth are all Deficit Series (R. 665). The public bondholders of these three Series would have benefited substantially if they had received the surplus in principal account of the Surplus Series as they would have under the order of the District Court which petitioner Sil-

* Eddy's testimony at the allowance application hearings indicates he did not understand what the Construction Proceeding was about (R. 364-395). Under examination by counsel for respondent, Eddy could not recall what the District Court had decided in the Construction Proceeding (R. 366-368); he said he read the appeal "if I signed it" (R. 383); he thought petitioner Silbiger's instant allowance application had to do with recovering moneys from Corporate Trustees (R. 381); again, although the Construction Proceeding was not commenced until the fall of 1945, Eddy said he thought petitioner Silbiger was applying for an allowance for services extending over a period of 14 years since 1934 (R. 392-393). Under the guidance of petitioner Silbiger's leading questions, Eddy became quite well informed about the Construction Proceeding (R. 372-375, 387-388), but on further examination he again showed he had no knowledge of petitioner Silbiger's activities in such proceeding (R. 376-377, 380).

biger aided in reversing. Petitioner Silbiger admitted that Mrs. Born and Mrs. Reilly lost money as a result of his appeal (R. 509), but he testified that in his conversations with Mrs. Born's husband, with whom he talked about the matter, that it never "dawned" on him to explain that Mrs. Born would lose money if petitioner Silbiger's appeal were successful (R. 515); and it is clear that Mrs. Born, and Mrs. Reilly as well, actually lost money. The Fourth Series, under the order of the District Court, would have received approximately $23,276.92 from the Surplus Series; the Eleventh Series would have received approximately $19,401.00; the Sixteenth Series, approximately $112,502.13; a total of $155,180.05 (R. 222-223, 665).* Mrs. Born's collateral in the Fourth and Sixteenth Series would have been increased by a total of $135,779.05; Mrs. Reilly's collateral in the Eleventh Series by $19,401.00; and both Mrs. Born's and Mrs. Reilly's dividends on their claims against the Guarantor corporation would have been increased.†

Petitioner Silbiger in an effort to avoid the conflict in which he placed himself, now argues that in the Construction Proceeding the "priority rights of the public bondholders of all series were identical" (petition p. 27). This is a reversal of the position he took below in supporting

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* The Plan provides for the distribution of surplus collateral *pro rata* in the proportion in which the principal amount of bonds outstanding in each Series, including subordinated bonds, bears to all outstanding bonds (R. 222-223). Upon the basis of Exhibit J (R. 665), the denominator in such fraction would be $6,848,239.78, which is $6,537,906.28, the total unpaid principal of all bonds of the ten Deficit Series, plus $310,333.50 the unpaid balance of principal of the subordinated bonds of the surplus Sixth and Twelfth Series. The numerator would be the unpaid principal of all bonds of each Deficit Series.

† The bondholders of all eighteen Series constitute approximately 43% of all creditors of Prudence Realization Corporation, successor to the Guarantor and holder of the subordinated bonds (R. 245). Thus, approximately 43% of all payments that would have been made on the subordinated bonds, pursuant to the District Court's order in the Construction Proceeding, would have been returned to all public bondholders as dividends on their claims against the Guarantor.

his exorbitant demand for an allowance of $459,500.00 (R. 158). At the hearings on the allowance applications, he testified that the interests of the bondholders of the Fourth, Eleventh and Sixteenth Series were "subordinate" (R. 509) and "were antagonistic to the interests of the bondholders in those Series where there was a surplus of collateral" (R. 461; see also, R. 348). Throughout his testimony, his examination of witnesses and in his arguments at the allowance application hearings, petitioner Silbiger repeatedly referred to the fact that the Construction Proceeding involved "diversity of interest" (R. 331), "antagonistic" interests (R. 348), "diverse claims as to the rights of the respective bondholders" (R. 363-364). He said the decision in the proceeding "determined finally the adverse claims of diverse claimants to the funds", the same as "in a lawsuit involving a contract" (R. 475). He testified he viewed the Construction Proceeding as "involving antagonistic claims of diverse interests in which I represented the interests that were successful" (R. 453). He said, "There was a sharp issue as to the rights of the bondholders of the Fifth Series (a Surplus Series) as against the rights of bondholders in other series" (R. 525). He said, "I decided what those rights were * * * and I took the necessary appeal" (R. 526). He testified that the "interests of the Seventh Series bondholders (a Deficit Series) were adverse to the interests I represented and on whose behalf I made the appeal" (R. 463) and that "I believe the Eleventh Series (Mrs. Reilly's Series) were in the same position as the Seventh Series and I took no appeal on behalf of the holders of bonds of the Eleventh Series, but I did take an appeal on behalf of the bondholders in the series which showed a surplus insofar as the order directed such surplus to be distributed in part to the Eleventh Series" (R. 463). And he said he did not attempt to defend the interests of Mrs. Born and Mrs. Reilly because "I did not believe they had any interests" (R. 509).

The unusual nature of petitioner Silbiger's advocacy is further shown by the fact that the Ninth and Seventeenth Series are Surplus Series (R. 665), and the fact that he "does not represent or appear for" any holders of bonds of those Series (R. 253). Notwithstanding this he contended, in substance, that no part of the surplus in those Series was distributable among his own clients as holders of Deficit Series bonds; and for this unusual service he demanded that the Ninth and Seventeenth Series bondholders, none of whom he represents, pay him allowances aggregating $141,900.00 (R. 44, 50).

At the hearings on the allowance applications, petitioner Silbiger attempted to repudiate Mrs. Born and Mrs. Reilly as his clients by suggesting, but not testifying, that he had been retained by them only in connection with the accountings by the Corporate Trustees of the Fourth, Eleventh and Sixteenth Series.* The Special Master who passed upon the allowance applications was misled by this stratagem. He said in his Report (R. 180):

> "Mr. Silbiger stated that he was retained by Mrs. Born and Mrs. Reilly only to advance their claims against the trustees and not on the question of allocation. His services for them had terminated, he said, and there was no conflict of interest."

Petitioner Silbiger, however, made no such statements. He testified, as he now sets forth in his petition, that he represented Mrs. Born and Mrs. Reilly in the Fourth, Eleventh and Sixteenth Series accountings and that those accountings had terminated, but he did not state, and does not now state in his petition, that he represented them only in connection with such accountings (R. 575-577).

The reorganization proceeding was instituted in June, 1934 (R. 211); the accountings not until the fall of 1938 (R. 225). The Special Master found (R. 248):

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* The Court below said, "The accountings were a part of the reorganization itself; * * * they were a step in the collection of the Debtor's assets" (R. 757).

"102. In or about the month of August, 1934, Samuel Silbiger was retained as attorney for George E. Eddy, Bessie B. Reilly (sister of George E. Eddy) and Katherine Born (the wife of Mr. Eddy's former factory superintendent), *in connection with their respective interests in the reorganization proceedings* * * *." (Emphasis added.) *

This finding of fact was compelled by the evidence. Petitioner Silbiger's own testimony, his own prior sworn statements in the case, and the testimony of Mr. Eddy and Mr. Born conclusively show that petitioner Silbiger had a general and not a limited retainer to represent Mrs. Born and Mrs. Reilly in this reorganization.

Petitioner Silbiger testified he discussed Mrs. Reilly's interests in the Construction Proceeding with her brother Mr. Eddy, who had a power of attorney to act on her behalf; that Eddy told him to proceed "without regard to what his rights or his sister's rights might be in other Series", † and that Eddy, acting for Mrs. Reilly, "didn't think it was necessary to even suggest that some other counsel be retained" (R. 512-513). Of course, if petitioner Silbiger did not represent Mrs. Reilly he would have had no occasion to discuss her interests in the Construction Proceeding. And as the Court below held, "since Mrs. Reilly

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* In a petition for an allowance in this reorganization, verified October 13, 1936, petitioner Silbiger described services he rendered on August 31, 1934 on behalf of "George E. Eddy, Katherine Born and others" (R. 249), and in other petitions for allowances verified April 20, 1944, May 19, 1945 and October 26, 1945, he said he was attorney for Mrs. Born and Mrs. Reilly (R. 249-250). Manifestly, if petitioner Silbiger represented Mrs. Born and Mrs. Reilly as early as 1934 and as late as October, 1945 (the Construction Proceeding started in August, 1945, R. 228-229), he was not retained by them only in connection with the Fourth, Eleventh and Sixteenth Series accountings which were instituted in the fall of 1938 and were all concluded by April, 1944 (R. 225-227, 575-577).

† There is no evidence that petitioner Silbiger explained to Eddy that Mrs. Reilly's interests were only in the other or Deficit Series; nor is there evidence that he explained that Mrs. Reilly would lose money if his contentions were sustained.

held only 'Deficit Bonds' and was certain to lose by the success of the 'Surplus Bonds', Eddy was not in a position to speak for her, for his interests and hers were in conflict. This must have been plain to Silbiger; and, if it was not, it should have been" (R. 758).

Petitioner Silbiger, moreover, testified to conversations he said he had with Mr. Born during and with reference to the Construction Proceeding (R. 513-522).* Petitioner was asked whether he discussed the "question of conflict of interest" with Mr. Born and he answered "I don't recall that I mentioned it to Mr. Born in so many words" (R. 526). He admitted he had not been discharged as Mrs. Born's attorney; he testified, "I cannot say that my representation of Bessie B. Reilly as an Eleventh Series bondholder was ever formally terminated" (R. 464). Petitioner Silbiger, indeed, specifically tesitfied that he represented Mrs. Born and Mrs. Reilly (R. 464-465) and that his duty to represent them in the Construction Proceeding was equal to his duty to represent Mr. Eddy (R. 507).

In addition to petitioner Silbiger's own testimony, the record contains testimony by Mr. Eddy and Mr. Born that petitioner Silbiger was and still is attorney in this reorganization for Mrs. Born and Mrs. Reilly. Eddy testified he retained petitioner Silbiger in 1934 (R. 365), and that under the power of attorney from his sister, he authorized peti-

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* Mr. Born's testimony indicates that he thought that if Mr. Silbiger "won the case" the surplus in the better Series would go to the "poorer Series" (R. 535-536). Petitioner Silbiger's testimony (R. 513-522), creates doubt about when he had his conversations with Mr. Born and what he told him. He first said he thought he discussed the matter with Mr. Born shortly before "he decided to take the appeal" (R. 513). Then he said, "before we wound up with the Spceial Master. I explained to him at that time just what position I intended to take" (R. 518); that "as these proceedings progressed he (Mr. Born) would confer with me and I would let him know what was going on" (R. 515); that he had "several conversations" with Mr. Born (R. 518); and that he "discussed the situation with respect to the bondholders' rights and what was happening in the Prudence matters all along on any occasion when I saw him" (R. 521).

tioner Silbiger to represent Mrs. Reilly, "in connection with anything that came up in the Prudence Bonds matter", "Just the same as myself" (R. 368). Eddy testified that Mrs. Born is the wife of his former factory superintendent; that he suggested to Mr. Born that petitioner Silbiger act for Mrs. Born, and that it was his (Eddy's) understanding that petitioner Silbiger was to represent Mrs. Born in the Prudence Bonds case to the same extent that he was to represent Eddy (R. 369).

Mr. Born testified that in 1934, when Prudence-Bonds Corporation went "kaflooey or broke", he and Eddy both went to see petitioner Silbiger at the same time and retained him to handle the matter and that as far as he knew petitioner Silbiger "is still the attorney for Mrs. Born" (R. 530). Mr. Born testified he had discussed the Prudence Bonds matter with petitioner Silbiger many times since 1934 and as recently as July, 1948 (R. 530-532). He testified he had retained petitioner Silbiger in the hope that Mrs. Born's bonds would realize more than they would without Mr. Silbiger's aid (R. 532); that he still had such hope; that it was his idea that petitioner Silbiger is still acting for Mrs. Born; and that it was still his hope that by having Mr. Silbiger act for them they would realize more money on Mrs. Born's bonds (R. 533).

Mr. Born further testified that in 1947, while the Construction Proceeding was pending, he talked with petitioner Silbiger about the Prudence Bonds matter; that he understood Mr. Silbiger was then appealing, but Mr. Silbiger did not explain to him the nature of the appeal; that he was "not familiar with the object that Mr. Silbiger was trying to attain on the appeals" (R. 533), but that it was his idea that in appealing Mr. Silbiger was trying to better "the interests of Mrs. Born as a holder of Prudence Bonds" (R. 543). Mr. Born said, "all I know is Prudence Bonds; that is all I know. In fact we left everything to him" (R. 533), and "All I know he was taking care of our interests, and that is all I know" (R. 533); and that what he and his wife were interested in was that Mr. Silbiger would take

care of their interests so that they "would get more money" on their bonds than they would without Mr. Silbiger's help (R. 543). Under examination by Mr. Silbiger, Mr. Born said, "I wasn't interested in anything, Sam. All I was interested in was the Fourth and Sixteenth Series. That was what interested us" (R. 539). Mr. Born said he never thought he "ought to engage other counsel or consult with other counsel with respect to the matter" (R. 540) and that Mr. Silbiger never suggested to him that he "should retain another attorney" (R. 543).

Mr. Born's testimony plainly shows that while he did not understand the details of the Construction Proceeding or the legal issues involved, he relied upon petitioner Silbiger to take care of Mrs. Born's interests as a bondholder. His confidence in petitioner Silbiger was misplaced. Mr. Silbiger was Mrs. Born's opponent; he advocated a position adverse to Mrs. Born's financial interests and aided in reversing the District Court's order under which Mrs. Born would have benefited financially. Petitioner Silbiger was also an opponent of his client Mrs. Reilly, holder of Eleventh Series bonds; he testified he appealed in an effort to obtain the result "that the Eleventh Series should not receive surplus collateral in other Series" (R. 463-464).

Petitioner Silbiger argues that in the Construction Proceeding he did not represent conflicting interests since he advocated only the side of his Surplus Series clients and did not advocate the side of his Deficit Series clients. This was the erroneous view taken by the Special Master who said (R. 181):

> "* * * it is not clear how his (petitioner Silbiger's) failure to espouse a cause, which would have been in conflict with the one he openly represented, created a conflict of interest. I find there was no conflict of interest and if Mr. Silbiger neglected to represent an interest when he was under the obligation to do so (and his clients have not asserted this) it does not affect his right to compensation for the interest he represented" (R. 181).

It is true petitioner Silbiger did not openly advocate both sides of the controversy. But in openly espousing the cause of his Surplus Series clients he at the same time necessarily openly assailed and opposed the cause of his Deficit Series clients. An attorney represents conflicting interests "when in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose" (Canon 6, Canons of Professional Ethics, N. Y. Judiciary Law, p. 767). The "best means of determining the existence of a conflict is whether, at any stage of the proceeding, an attorney's duty to one interest will compel him to assail or neglect the other" (Thornton, Attorneys at Law, Vol. 1, Sec. 176; see also *Field* v. *Moore*, 189 App. Div. (N. Y.) 709, 712; *Loew* v. *Gillespie*, 90 Misc. (N. Y.) 616, aff'd 173 App. Div. 889; *Woods* v. *City National Bank*, 312 U. S. 262; *Crites* v. *Prudential Co.*, 322 U. S. 408; *In re Midland United Co.*, 64 F. Supp. 399, aff'd 159 F. 2d 340; *In re Philadelphia & W. Ry. Co.*, 73 F. Supp. 169; Restatement, Law of Agency, Sec. 394(d); Collier on Bankruptcy, Vol. 6, pp. 2922-2923). As the Court said in *In re Philadelphia & W. Ry. Co., supra* (p. 172): "If diversity of aims arises between groups of bondholders there is, of course, no question that the dual representation becomes improper."

It is clear from the facts that petitioner Silbiger represented conflicting interests and was, as the Court below held, disloyal to his Deficit Series clients (R. 757). The conflicting interests in the Construction Proceeding were not the subject of adjustment; they were the subject of litigation. It is of no importance whether any of petitioner Silbiger's Deficit Series clients have or have not come forward to move to disqualify petitioner or to assert that he neglected their interests. That is a matter between them and Mr. Silbiger. Mr. Silbiger is not suing any of his individual clients for a fee; this was not an action by clients against Mr. Silbiger for damages, or a proceeding to set aside a judgment on the ground that an attor-

ney represented conflicting interests. This was a proceeding by petitioner Silbiger to obtain an allowance from the Bankruptcy Court (Cf. *Weil* v. *Neary*, 278 U. S. 160, 171).

CONCLUSION

The petition of Samuel Silbiger, Esq. for a writ of certiorari does not present any issue of law warranting review under the rules and practice in this Court. The Court below erred, we submit, not in finding that petitioner Silbiger represented conflicting interests, but in holding that notwithstanding his violation of the "rule of undivided loyalty" he may nevertheless be awarded an allowance on a reduced basis on the ground "there is a distinction between a corporate reorganization and an ordinary suit *inter partes*" (R. 760).

Respectfully submitted,

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